

STATE OF ALASKA

IBLA 83-116

Decided February 3, 1983

Appeal from a decision of the Alaska State Office, Bureau of Land Management, dismissing protest against Native allotment application A-047548.

Appeal dismissed.

1. Appeals -- Rules of Practice: Appeals: Dismissal -- Rules of Practice: Appeals: Timely Filing

Notice of appeal from the dismissal of a protest filed by the State of Alaska pursuant to sec. 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5)(B) (Supp. IV 1980), must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

APPEARANCES: Claire Steffens, Esq., Office of the Attorney General, Anchorage, Alaska, for appellant; James Vollintine, Esq., Anchorage, Alaska, for the respondent.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

The State of Alaska has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated September 22, 1982, dismissing the State's protest against Native allotment application A-047548. This application was filed on March 24, 1959, by Nels W. Nelson, Jr., for lands in sec. 5, T. 11 N., R. 2 W., Seward meridian.

The State's protest was filed on June 1, 1981, pursuant to section 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act (ANILCA),

43 U.S.C. § 1634(a)(5)(B) (Supp. IV 1980). The protest alleged that Native allotment application A-047548 identifies land necessary for access to lands owned by the United States, the State of Alaska, or a political subdivision of the State, to resources located thereon, or to a public body of water regularly employed for transportation purposes. The protest further alleged that lands in application A-047548 are used for an existing trail and that no reasonable alternative for access exists because there is an existing constructed public access route, transportation facility, or corridor. By its protest, the State sought to require that application A-047548 be adjudicated according to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970) (repealed Dec. 18, 1971, subject to applications pending before the Department on that date, 43 U.S.C. § 1617 (1976)), rather than receive legislative approval under section 905(a)(1).

By decision dated September 22, 1982, BLM dismissed the State's protest on the grounds that the protest did not "state with specificity the facts upon which the conclusions concerning access are based, and no reasonable alternatives for access exist." Dismissal was also based upon the fact that the land surrounding the parcel sought by application A-047548 was tentatively approved to the State and the existing public access route claimed by the State to be needed for access runs across land which already had been certificated to the applicant.

The BLM decision was mailed by certified mail to the State of Alaska, Department of Natural Resources, Division of Research and Development. A return receipt card in the file reveals that the decision was received on September 27, 1982, by an individual named Hill. The State appealed BLM's decision by a notice of appeal filed with BLM on October 29, 1982. The notice of appeal itself is dated October 28, 1982, and signed by counsel for the State.

[1] By a pleading filed December 13, 1982, counsel for Nels W. Nelson, Jr., moved this Board to dismiss the State's appeal as untimely. On January 5, 1983, the State filed a memorandum in opposition to the motion and specifically asked this Board to rule on the motion. Thereafter, additional pleadings were received from the parties. In support of the motion, counsel for Nelson cites 43 CFR 4.411(a) and (b), set forth below:

(a) A person who wishes to appeal to the Board must file in the office of the officer who made the decision (not the Board) a notice that he wishes to appeal. The notice of appeal must give the serial number or other identification of the case and must be transmitted in time to be filed in the office, where it is required to be filed within 30 days after the person taking the appeal is served with the decision from which he is appealing. \* \* \*

(b) No extension of time will be granted for filing the notice of appeal. \* \* \*  
If the notice of appeal is filed during the grace period provided in § 4.401(a) and the delay in filing is not waived, as provided in that section, the notice of appeal will not be considered and the appeal will be dismissed by the Board. [Emphasis added.]

Regulation 43 CFR 4.401(a) provides that a delay in filing may be waived if the required document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted before the end of the period in which it was required to be filed. If the State is deemed to have received BLM's decision on September 27, 1982, its notice of appeal must have been transmitted or probably transmitted by October 27, 1982, to qualify for a waiver of its delay in filing. As noted above, the notice is dated October 28, 1982. This fact lends support to the conclusion that the notice was not transmitted by October 27. No evidence has been submitted indicating that the notice of appeal was transmitted before the end of the period in which it was required to be filed.

Counsel for the State maintains that the Division of Research and Development, whose Director would be the person appealing from BLM's decision, was never personally served with BLM's decision. Counsel acknowledges, however, that the Division received BLM's decision on September 28, 1982. She states that she has been unable to confirm that the return receipt card accompanying this decision bears a September 27 date. She states that BLM's duplicate file in Anchorage did not contain a copy of a return receipt card for the decision. A signature on a return receipt card for a certified letter by a person other than the person to be served, counsel argues, does not satisfy the requirement for service set forth in the regulations or in the Federal Rules of Civil Procedure.

The regulation referred to, 43 CFR 4.401(c), states in relevant part,

(c) Service of documents. (1) Wherever the regulations in this subpart require that a copy of a document be served upon a person, service may be made by delivering the copy personally to him or by sending the document by registered or certified mail, return receipt requested, to his address of record in the Bureau.

(2) \* \* \* Service by registered or certified mail may be proved by a post-office return receipt showing that the document was delivered at the person's record address \* \* \*. \* \* \*

(3) A document will be considered to have been served at the time of personal service, of delivery of a registered or certified letter, or of the return by the post office of an undelivered registered or certified letter.

The above-quoted regulation establishes that the Division of Research and Development has been served with BLM's decision. The State's contention that the Director of this division was not served overlooks the fact that neither the Director's name nor title appears anywhere on the State's protest of June 1, 1981. Contrary to counsel's contention that the Director would be the person appealing an adverse decision of BLM, the notice of appeal filed by the State contains no reference to the Director or the Division of Research and Development.

On the basis of information set forth in the State's protest, BLM properly addressed its decision of September 22 to the State of Alaska, Department of Natural Resources, Division of Research and Development. An individual who must be presumed to be an agent of the State in the absence of any countervailing information received BLM's decision on September 27, 1982. See State of Alaska, 58 IBLA 118 (1981). The State, not having transmitted its notice of appeal before the end of the period in which it was required to be filed, is not entitled to a waiver of its delay in filing. The timely filing of a notice of appeal is jurisdictional, and failure to file the appeal within the time allowed requires that we dismiss the appeal. Russell L. Osborn, 62 IBLA 104 (1982).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

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Anne Poindexter Lewis  
Administrative Judge

We concur:

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Gail M. Frazier  
Administrative Judge

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Bruce R. Harris  
Administrative Judge

